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No. 08A332

Supreme Court, U.S.
FILED
OCT 16 2008
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

JENNIFER BRUNNER, Secretary of State of Ohio, *Applicant*,

v.

OHIO REPUBLICAN PARTY, *et al*, *Respondents*.

a Application for Stay from the United States Court of Appeals for the Sixth Circuit

MOTION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPLICANT AND TO FORMAT BRIEF UNDER RULE 33.2 BY AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; SERVICE EMPLOYEES INTERNATIONAL UNION; OHIO AFL-CIO; AND DISTRICT 1199, HEALTH CARE AND SOCIAL SERVICE UNION, SEIU

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MOTION TO FILE *AMICUS CURIAE* BRIEF AND TO FORMAT BRIEF UNDER RULE 33.2

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), Service Employees International Union ("SEIU"), Ohio AFL-CIO, and District 1199, Health Care and Social Service Union, SEIU respectfully request leave to file the accompanying brief as *amici curiae* in support of the Secretary of State's Application for a Stay of a Temporary Restraining Order. Counsel for Applicant and Respondents have consented to the filing of this *amicus* brief.

Amici also respectfully seek leave to format this brief in accordance with Supreme Court Rule 33.2 rather than Supreme Court Rule 33.1 due to the urgency of the pending matter. The Secretary of State's motion was filed after business hours on October 15, 2008 and the temporary restraining order that the Secretary seeks to stay requires compliance by October 17, 2008. *Amici* are unable to prepare this brief in accordance with Rule 33.1 in time to permit this Court's consideration.

Amicus curiae the AFL-CIO is a federation of 56 national and international labor organizations with a total membership of 10.5 million working men and women including 650,000 Ohio workers and 300,000 Ohio retirees. Among other things, it engages in non-partisan voter protection activities in Ohio and elsewhere.

Amicus curiae the SEIU is an international union with 2 million members including tens of thousands in Ohio. SEIU engages in voter registration, education and other election-related activities within Ohio and throughout the rest of the country on behalf of its members.

Amicus curiae the Ohio AFL-CIO represents 1,600 local unions across Ohio from 48 different international unions. The local unions that comprise the Ohio AFL-CIO represent approximately 650,000 working men and women, and some 300,000 union retirees. The Ohio AFL-CIO works to bring economic and social justice to the workplace and to the lives of

working Ohioan men and women. To this end, the Ohio AFL-CIO engages in voter registration, education and other election-related activities.

Amicus curiae District 1199 is a local union affiliated with the Service Employees International Union. District 1199 represents approximately 28,000 health care and social service workers in Ohio, Kentucky, and West Virginia. District 1199's Constitution expressly provides that one of the organization's purposes is "to maintain, preserve and extend the democratic process and institutions of our country." District 1199 engages in voter registration, education and other election-related activities within the State of Ohio on behalf of its members.

Amici represent members who have registered to vote in Ohio in the upcoming general election, and *Amici* have an interest in ensuring that their members are permitted to exercise the right to vote. *Amici* the Ohio AFL-CIO and District 1199 have already filed a separate *amicus* brief in this case in the Sixth Circuit, in support of the Secretary of State's request to stay the temporary restraining order at issue here, and an *amicus* brief in the District Court, in opposition to a separate request for a temporary restraining order.

For good cause shown, *Amici* respectfully submit that the Court should grant the motion for leave to file the amicus brief filed herewith, formatted according to Rule 33.2.

Dated: October 16, 2008

Respectfully submitted,

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On Application for Stay from the United States Court of Appeals for the Sixth Circuit

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AMICUS CURIAE BRIEF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; SERVICE EMPLOYEES INTERNATIONAL UNION; OHIO AFL-CIO; AND DISTRICT 1199, HEALTH CARE AND SOCIAL SERVICE UNION, SEIU

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INTEREST OF *AMICI CURIAE*

Amicus curiae the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 56 national and international labor organizations with a total membership of 10.5 million working men and women including 650,000 Ohio workers and 300,000 Ohio retirees. Among other things, it engages in non-partisan voter protection activities in Ohio and elsewhere.

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No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Amici represent members who have registered to vote in Ohio in the upcoming general election and have an interest in ensuring that their members are permitted to exercise the right to vote. *Amici* the Ohio AFL-CIO and District 1199 have already filed two *amicus* brief in this case, one in the U.S. District Court for the Southern District of Ohio and one in the U.S. Court of Appeals for the Sixth Circuit.

Counsel for *Amici* gave timely notice of intent to file this brief to Counsel of Record for Applicant and Sixth Circuit counsel for Respondents on October 16, 2008. Counsel for Applicant and Respondents have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court should grant the Secretary of State's Application for a Stay of a Temporary Restraining Order because its precedent forecloses Plaintiffs from enforcing the statutory provision at issue via 42 U.S.C. §1983. Under this Court's authority, Congress' phrasing of the statutory provision at issue as imposing obligations upon government officials shows that the provision does not grant any individual rights, and the lower courts erred in focusing on the Congressional Act as a whole rather than the specific statutory provision at issue.

ARGUMENT

Amici curiae submit this brief in support of the Secretary of State's Application for a Stay of a Temporary Restraining Order. *Amici* write separately here to offer two additional reasons why this Court's precedent clearly forecloses reliance on Section 1983 to enforce the provision of the Help America Vote Act ("HAVA") at issue: first, because the provision at issue imposes obligations upon government officials rather than conveying any rights; and second, because the required inquiry focuses on the specific statutory provision at issue rather than the Congressional Act as a whole.

In this Court's precedent, the majority of the *en banc* U.S. Court of Appeals for the Sixth Circuit unsurprisingly could not bring itself to hold the statutory provision at issue enforceable via Section 1983, but instead sought to evade the applicable precedent by stating simply that the argument "raises a difficult issue" and that "[t]he 'close' answer to this question, together with the reality that all of the other risks of error support the plaintiffs, weigh in favor of denying the Secretary's motion to stay the TRO." *Ohio Republican Party et al. v. Brunner*, No. 08-4322 at 8 (6th Cir. Oct. 14, 2008). But the issue is not difficult, and the answer is not close. There is no privately enforceable right here, and so no temporary restraining order should have issued.

1. As the Secretary of State has explained in her Application for a Stay of a Temporary Restraining Order, the HAVA provision at issue contains no rights-creating language; rather, at most, it imposes mandates upon state officials. That provision reads in full:

> Sharing information in databases. The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

42 U.S.C. §15483(a)(5)(B)(i).

This Court has made it clear that "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (internal quotation marks omitted).[2] Thus, statutes that "have an aggregate focus" in that they "speak only in terms of institutional policy and practice" do not confer a right enforceable via Section 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 288 (2002) (internal quotation marks omitted); *see also id.* (statutory "provisions

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[2] The inquiry to determine whether a statute confers enforceable rights is no different in an implied private right of action case (such as *Alexander*) than in a Section 1983 case. *See Gonzaga University v. Doe*, 536 U.S. 273, 283-285 (2002).

[at issue] further speak[s] only in terms of institutional policy and practice, not individual instances of disclosure. . . . Therefore, as in *Blessing*, they have an aggregate focus, they are not concerned with whether the needs of any particular person have been satisfied, and they cannot give rise to individual rights") (internal quotation marks and citations omitted); *Blessing v. Freestone*, 520 U.S. 329, 343 (1997) ("Far from creating an *individual* entitlement to services, the standard is simply a yardstick for the Secretary to measure the *systemwide* performance of State's Title IV-D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied.") (empahses in original).

Here, there can be no question but that the statute at issue focuses on the persons regulated – "[t]he chief State election official and the official responsible for the State motor vehicle authority" – and requires them to enter an agreement. There is no mention of the individuals benefited by this statute, much less an unambiguous conveyance of rights to such individuals. That alone forecloses Plaintiffs' claim, and renders the grant of the temporary restraining order an abuse of discretion.

Surprisingly, the Sixth Circuit asserts that it is an open question whether "*Gonzaga* requires individual-rights-granting language even when there is no individual to whom such language could apply" because the class of persons benefited is as broad as all voters. *Ohio Republican Party et al. v. Brunner*, No. 08-4322 at 7 (6th Cir. Oct. 14, 2008). But this Court has made it clear that a private right may be implied only when the statute identifies "a class for whose *especial* benefit the statute was enacted." *California v. Sierra Club*, 451 U.S. 287, 293 (1981) (emphasis in original); *see also id.* at 294 ("Here, the statute states no more than a general proscription of certain activities; *it does not unmistakably focus on any particular class of beneficiaries* whose welfare Congress intended to further. Such language does not indicate an intent to provide for private rights of action.") (emphasis added).

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"[T]he questio. /hether Congress . . . intended to create a private right of action is definitively answered in the negative where a statute by its terms grants no private rights *to any identifiable class*." *Gonzaga*, 536 U.S. at 283-284 (emphasis added; internal brackets and quotation marks omitted); *see also id.* at 285 (key question is "whether or not Congress intended to confer individual rights upon a *class* of beneficiaries") (emphasis added). The Sixth Circuit's proposal that statutes that benefit the public in general have a special claim to enforcement through Section 1983, while a statute that benefits an identifiable class would not, simply turns the inquiry established by this Court on its head, in defiance of precedent, logic, and common sense.

2. In the face of this clear precedent, the Sixth Circuit majority and the District Court proposed a different inquiry: not whether the statutory provision at issue conveys rights, but whether HAVA as a whole does so. *See Ohio Republican Party et al. v. Brunner*, No. 08-4322 at 8 (6th Cir. Oct. 14, 2008) (saying it would be "oddity" if Congress meant to permit private individuals to enforce provisional ballot sections of HAVA but not HAVA's "anti-fraud provisions"); *Ohio Republican Party et al. v. Brunner*, No. 2:08-CV-00913 at 7 (S.D. Ohio Oct. 9, 2008) (holding prior Sixth Circuit holding that HAVA's provisional ballot provision may be enforced through Section 1983 dispositive on question whether provision at issue may also be so enforced).

But this Court long ago foreclosed such an approach. In *Blessing v. Freestone*, 520 U.S. 329 (1997), this Court reversed a lower court's determination that Title IV-D of the Social Security Act creates an enforceable right. The decision explains that the lower court had "paint[ed] with too broad a brush" in holding Title IV-D created such rights "[w]ithout distinguishing among the numerous rights that might have been created by this federally funded

welfare program." *Id.* 342. Instead, this Court instructed, courts must focus on the specific statutory provisions and rights at issue, as had been its approach in numerous prior cases:

> In *Wright*, for example, we held that tenants of public housing projects had a right to have their utility costs included within a rental payment that did not exceed 30 percent of their income. We did not ask whether the federal housing legislation generally gave rise to rights; rather, *we focused our analysis on a specific statutory provision* limiting "rent" to 30 percent of a tenant's income. Similarly, in *Wilder*, we held that health care providers had an enforceable right to reimbursement at "reasonable and adequate rates" *as required by a particular provision* in the Medicaid statute. . . . Finally, in *Livadas*, we discerned in the structure of the National Labor Relations Act (NLRA) the very specific right of employees "to complete the collective-bargaining process and agree to an arbitration clause." We did not simply ask whether the NLRA created unspecified "rights."

Blessing, 520 U.S. at 342-43 (citing *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987); *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498 (1990); *Livadas v. Bradshaw*, 512 U.S. 107 (1994)) (emphasis added; internal citations and parentheticals omitted). Here, similarly, this Court must decide whether 42 U.S.C. §15483(a)(5)(B)(i) – not HAVA as a whole – gives rise to enforceable rights. Plaintiffs and the lower courts offer no plausible reading of the language of that provision that would support such a determination.[3]

3. When, as here, the district court's reasoning so clearly contradicts the instruction of the Supreme Court, such error alone is sufficient reason to grant a stay. *See, e.g., Pacileo v. Walker*, 446 U.S. 1307, 1310 (Rehnquist, Circuit Justice 1980) (granting stay because "the [challenged] order . . . is very much at odds with principles set forth in [Supreme Court cases]").[4]

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[3] Because it is clear that the statutory provision at issue does not create an unambiguous right, there is no need to ask whether the existence of an alternative enforcement mechanism shows that Congress meant to preclude a remedy for the right at issue. *See Gonzaga Univ.*, 536 U.S. at 284-85 & n. 4.

[4] As the Secretary of State explained, the Plaintiffs' delay also weighs strongly against the grant of equitable relief. *See Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (setting forth elements of defense of laches). In addition to the Secretary of State's detailed explanation as to why the delay was unjustified, *Amici* point out that the Sixth Circuit's suggestion that Plaintiffs' delay in filing was attributable to efforts to resolve election disputes out of court not only finds no support in the record but also is belied by evidence that at no time did a representative of Plaintiff Republican Party contact the Secretary of State's office even to inquire about the State's

CONCLUSION

For the reasons discussed, the Secretary's Application for a Stay of a Temporary Restraining Order should be granted.

Dated: October 16, 2008

Respectfully submitted,

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methods for matching data under HAVA, even though HAVA was passed in 2002, the Secretary of State signed a memorandum of understanding with the state Bureau of Motor Vehicles regarding information sharing in 2004, and the manual on which Plaintiffs base their claims was released in January 2008. Farrell Affidavit (D.Ct. Dkt. Nos. 44-9, 44-10) ¶¶8, 10, Ex. A; Maragos Affidavit (D.Ct. Dkt. No. 44-1) ¶5.

By: _____
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